Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

Joseph C. Fisher, et ux.

Petitioners

v.

Aetna Life Insurance & Annuity Company

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions for Review

1. Did the United States Court of Appeals for the Third Circuit deny the **constitutional rights** of Petitioners under the 7th Amendment by failing to recognize the "material fact" of the nondisclosure of the insurance premium escalation?

2. Did the United States Court of Appeals for the Third Circuit consider the undisputed fact that the insurance premiums of the Petitioners will escalate from the Annual Planned Premiums of $1,320 and $540 respectively to $30,575 and $28,596 in the final year of the policy's life?

3. Did the United States Court of Appeals for the Third Circuit consider the fact that this rate of escalation is not disclosed in the policies?

4. Did the United States Court of Appeals for the Third Circuit consider the possibility, applying the test of reasonableness, that had the above escalation been disclosed, that the Petitioners probably would not have purchased these policies?

5. Did the United States Court of Appeals for the Third Circuit **explore the possibility that the failure of the Respondent to disclose the above escalation might, allow "a reasonable jury, to find in favor of the non-moving party"?**

Parties

Joseph C. Fisher and Robin H. Fisher
Petitioners
v.
Aetna Life Insurance & Annuity Company
Respondent

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Amendment VII of the Constitution.

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986) Fed. R. Civ. P.56; Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

Code Civ. Proc., section 437c; Mann v. Cracchiolo (1985) 38 Ca;/ 3d 18, 35.

(Asare v. Hartford Fire Ins. Co. (1991)1 Cap. App.4th 856, 862.).

Official Reports of Opinion

United States Court of Appeals for the Third Circuit
Submitted Under Third Circuit LAR 34.1(a)
January 25, 1999
Before: Sloviter, McKee and Rendell, Circuit Judges
Affirmed Summary Judgement of Judge Caputo

United States District Court
for the Middle District of Pennsylvania
D.C. Civil No. 96-cv-01768
May 11, 1998 and filed June 5, 1998
District Judge: Honorable A. Richard Caputo
Granted Summary Judgement on the part of Respondent

Jurisdictional Statement

The federal jurisdiction in the court of first instance is as follows. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C 1332 (a) as there is complete diversity of citizenship between the parties and the amount in controversy is in excess of $50,000, exclusive of interest and costs.

Date of Judgement

On January 25, 1999, the United States Court of Appeals for the Third Circuit, No. 98-7356, affirmed the Motion for Summary Judgement granted in favor of the Respondent.

Statutory Provisions

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)

Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986) Fed. R. Civ. P.56; Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

Code Civ. Proc., section 437c; Mann v. Cracchiolo (1985) 38 Ca;/ 3d 18, 35.

(Asare v. Hartford Fire Ins. Co. (1991)1 Cap. App.4th 856, 862.)

Constitutional Provision

Amendment VII of the Constitution states, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Statement of the Case

In 1989, Petitioner purchased 2 life insurance policies believing they had a level "Annual Planned Premium" of $1,320 and $540 respectively. In about 1995, it was discovered that the premiums would increase to approximately $30,575 and $28,597 respectively. A lawsuit was filed on September 5, 1996 in the United States District Court for the Middle District of

Pennsylvania. Discovery was conducted and the Respondent filed a Motion for Summary Judgement. The motion was granted. Petitioners appealed the decision to the United States Court of Appeals for the Third Circuit. The decision of the lower court was affirmed.

The oral deposition of one of the Petitioners, Joseph C. Fisher, on 23 separate occasions refers to the escalation of the premium in both policies. On seven separate occasions, the specific escalation of the policies, from $1,320 and $540 respectively to $30,575 and $28,596 in the final year of the policy's life are detailed, namely, pages 77, 88, 89, 125, 126 and 159.

> "By Mr. Carissimi
> Q. Does it (the policy) have false statements?"
> A. The annual planned premium, it's something which is planned, annually, $1,320 a year. Let me make it quite clear, counselor. There's a hell of a difference between $1,320 and $30,575. That's a lie. Its deception. It's everything wrong. And your company ought to be brought down because they're a bunch of thieves. That's a lie. $1,320 is untrue, it's misleading, it's a down right barefaced lie, and they've

> untrue, it's misleading, it's a down right barefaced lie, and they've ripped off me and hundreds of thousands of other people to the tune--" (Fisher deposition, Pages 158 and 159).

Based on the above information, the decision of both the original trial judge and the judges of United States Court of Appeals for the Third Circuit seems to be in direct conflict with the previous decisions of the Supreme Court, namely Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) and Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986), concerning material facts, "such that a reasonable jury could find in favor of the non-moving party."

After the potential difficulties with the policy were discovered, Petitioners, after much study and conference with a variety of experts, found that the "Table of Guaranteed Maximum Insurance Rates" on Page 4 of the policy are factors that if multiplied by the death benefit in units of one thousand will compute the monthly insurance premiums for any given year. Multiplying the monthly guaranteed maximum insurance rate by 100 ($100,000 death benefit) by 12 (months) computes the annual premium for that year (Monthly Rate, at age 85, 14.7305 x 100 x 12 = $17,677). Exhibit U-13 is a schedule computing the monthly rate by 100 by 12 for attained ages 63 through and including 85. Following the same formula for the final year of the policies, Age 94, computes as follows, Monthly Rate, 25.47890 x 100 x 12 = $30,575 premium required to sustain Mr. Fisher's

policy and Monthly Rate, 23.83050 x 100 x 12 = $28,597 required to sustain Mrs. Fisher's policy.

In the oral deposition of Frank B. Urso, "...(an Aetna) corporate designee knowledgeable about the use of illustration in connection with the sale of universal life...", (Urso deposition, page 4) Respondent admitted that the figures contained in Exhibit U-13 were "It's close. There could otherwise be some administration charges. This is just purely cost of insurance charge here. So there could be some other type of charges involved." (Urso deposition, page 229.)

Basis for Federal Jurisdiction

The federal jurisdiction in the court of first instance is as follows. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C 1332 (a) as there is complete diversity of citizenship between the parties and the amount in controversy is in excess of $50,000, exclusive of interest and costs.

Reasons for the Allowance of the Writ

The original trial judge and the judges of United States Court of Appeals for the Third Circuit either missed or were unaware of the main focus of the complaint against the Respondent, namely that the premiums of the insurance policies while indicated in the policies to be an "Annual Planned Premium" of $1,320 and $540 respectively, will increase to $30,575 and $28,596 respectively in the final year of the policy's life. The opinions of both Courts refer to the possibility of the

policy lapsing. The policy is, by its face, a 51 year contract. It may terminate for non-payment of premiums but if the required premiums are paid, no matter how high, it cannot lapse. Therefore, it appears that the original trial judge and the judges of United States Court of Appeals for the Third Circuit did not consider or were not aware of **all** of the evidence. It is difficult to believe that a reasonable person could conclude that if the escalation rates of these policies were disclosed, they, (Respondent) would have a marketable product. Therefore it is equally difficult to conclude that if a reasonable person purchasing these policies was not mislead, or the true nature of the policies with regard to the cost of insurance, was not concealed, that they (a reasonable person) would purchase the policies.

Summary judgement is appropriate only if the moving party can demonstrate from the record that "there is no genuine issue as to any material fact". Fed. R. Civ. P.56; Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

"A material fact" is one which might affect the outcome of the case under governing law." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). "To preclude summary judgment, the dispute about a material fact must also be "genuine," such that a reasonable jury could find in favor of the non-moving party." Id. It is an undisputed material fact, via the "Table of Guaranteed Maximum Insurance Rates" stated in the policies, the calculations of the Petitioners and the testimony of Respondent's representative that the escalation rates of these

policies as stated herein are accurate or very close to accurate. The test of reasonableness applies, that is, had the Respondent and/or it agents clearly and accurately disclosed the escalation rates of the policies in question, from $1,320 and $540 respectively to $30,575 and $28,596 in the final year of the policy's life, would a reasonable person, seeking level premiums, have purchased them?

"Summary judgment is properly granted when the evidence in support of the moving party establishes that there is no issue of material fact to be tried" (Code Civ. Proc., section 437c; Mann v. Cracchiolo (1985) 38 Ca;/ 3d 18, 35.). Since the escalation rates of the policies are undisputed, the question in dispute is, did the Respondent adequately disclose to, or inform the Petitioners of the escalation rate or the true cost of insurance and the premiums, or did the Respondent conceal or fail to disclose the escalation inherent in these policies at the time the policies were purchased? It is an undisputed fact that the Petitioners sought insurance coverage with "level premiums". The trial court and the United States Court of Appeals for the Third Circuit both indicate that there is no material fact in dispute for a jury to decide. The material fact for a jury to decide is whether or not the Petitioners were informed, by the Respondent, of the escalation inherent in these policies at the time of purchase. We plead with the Supreme Court to review this matter because it is axiomatic that had the Petitioners not been mislead or had not the true escalation of these policies been concealed, Petitioners would not have purchased the policies.

"The court is required to consider all the evidence set forth in the papers, except where objections are properly sustained, and all inferences reasonably deductible from such evidence. Any doubts as to the propriety of granting the motion must be resolved in favor of the party opposing the motion." (Asare v. Hartford Fire Ins. Co. (1991)1 Cap. App.4th 856, 862.) Both the original trial judge and the judges of United States Court of Appeals for the Third Circuit are silent concerning the opinion of Mr. Ben G. Baldwin Jr. (a recognized expert in the field of insurance) that "...Aetna does not, directly or through its agents, provide adequate disclosures regarding the nature and risks of its universal life product." (Baldwin Report, page 5).

Additionally, both the original trial judge and the judges of United States Court of Appeals for the Third Circuit are silent concerning the undisputed fact that these policies will escalate from $1,320 and $540 respectively, to $30,575 and $28,596 respectively in the final year of the policy's life. It appears that the court did not consider all of the evidence and therefore the grant of the Respondent's Motion for Summary Judgement is suspected of being inappropriate, in direct conflict with Rule 10 (c) of the Rules of the Supreme Court of the United States because it conflicts with previous decisions of the Supreme Court. Namely, Anderson v. Liberty Lobby relevant to believing the testimony of the Petitioners and Celotex v. Catrett concerning material facts (there is a substantial difference between $1,320 and $30,575 per year). Therefore, the decision of the United States Court of Appeals for the Third Circuit, in this matter, is

deserving of the review of the Supreme Court.

"The moving party is entitled to a judgement as a matter of law because the nonmoving party [477 U.S. 317, 318] has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. Pp. 322-323." Is Mr. Urso's admission of the escalation of Appellants premiums not an essential element of this case?

"In ruling on a motion for summary judgement, the court is not to make credibility determinations, weigh evidence, or draw from the facts legitimate inferences for the movant. Rather, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." (Anderson, 447 U.S. at 255). If this statement is a matter of law, why did the original trial judge and the judges of United States Court of Appeals for the Third Circuit not believe the testimony of the Petitioners, Mr. Urso (a representative of the Respondent) or the report of Mr. Baldwin? Considering the above, the grant of Summary Judgement to the Respondent is suspected of being inappropriate and in direct conflict with Rule 10 (c) of the Rules of the Supreme Court of the United States because it conflicts with previous decisions of the Supreme Court (Anderson v. Liberty Lobby) relevant to believing the testimony of the Petitioners and (Celotex v. Catrett) concerning material facts (there is a substantial difference between $1,320 and $30,575 per year). Therefore, the decision of the United States Court of Appeals for the Third Circuit, in this matter, is deserving of the review of the Supreme Court.

Since the escalation of the premiums of the Petitioners insurance policies is an undisputed material fact and no reasonable person would purchase such a policy had an escalation of this magnitude been disclosed, is it not reasonable to assume that a "reasonable jury could find in favor of the non-moving party" (Petitioners)?

If the honorable Court finds the previous information to have merit, the grant of the Respondent's Motion for Summary Judgement is suspected of being inappropriate, in direct conflict with Rule 10 (c) of the Rules of the Supreme Court of the United States because it conflicts with previous decisions of the Supreme Court. Namely, Anderson v. Liberty Lobby relevant to believing the testimony of the Petitioners and (Celotex v. Catrett) concerning material facts (there is a substantial difference between $1,320 and $30,575 per year). Therefore, the decision of the United States Court of Appeals for the Third Circuit, in this matter, is deserving of the review of the Supreme Court.

The decision of both courts make repeated reference to the potential for the policies to lapse and no reference to the dollar amount of the increases in premiums required to maintain the policies, or the lack of disclosure concerning the magnitude of any increases in the premiums. The policies can not lapse if the premiums are paid because they are 51 year contracts. It is now known and undisputed that in order for the policies to remain in force additional premiums will be required beginning in about the eighteenth year of the policies. At that time, the premiums increase from $1,320 and $540 respectively to $3,031 and $753. The premiums continue to increase for the remainder

of the 51 year life of the policies and in the final year, the premiums will be $30,575 and $28,597 respectively.

If no failure to disclose, misrepresent, defraud, or commit a violation of Pennsylvania Fair Trade Practices or commit a violation of consumer protections laws occurred, who would purchase policies with this rate of escalation? If "The court is required to consider all the evidence...", why was the original trial judge and the judges of the United States Court of Appeals for the Third Circuit silent concerning Mr. Fisher's and Mr. Urso's depositions, relevant to the escalation of the "Annual Planned Premiums" and the entirety of Mr. Baldwin's report? The testimony contained in Mr. Fisher's deposition, Mr. Urso's deposition and Mr. Baldwin's report clearly indicate that there is a genuine issue as to material fact, namely, the Petitioners were never informed of the magnitude of any potential increases in the cost of insurance or increases in premiums. If the original trial judge or the judges of the United States Court of Appeals for the Third Circuit were unaware of this evidence, or failed to recognize such, it is the opinion of the Petitioners that the grant of the Respondent's Motion For Summary Judgement might be suspected of being inappropriate, in direct conflict with Rule 10 (c) of the Rules of the Supreme Court of the United States because it conflicts with previous decisions of the Supreme Court (Anderson v. Liberty Lobby) relevant to believing the testimony of the Petitioners and (Celotex v. Catrett) concerning material facts (there is a substantial difference between $1,320 and $30,575 per year). Therefore, the decision of the United States Court of Appeals for the Third Circuit, in this matter, is deserving

of the review of the Supreme Court.

The rule of reasonability applies, that is, would a reasonable person, seeking level premiums, knowing full well that the insurance premiums will increase from $1,320 and $540 per annum to $30,575 and $28,597 per annum, purchase such policies? All the Petitioners ask is that they be granted their "**right of trial by jury**", guaranteed under the seventh amendment of the constitution to have their day in court, to have a jury decide, considering the escalation rates in these policies, whether a failure to disclose, misrepresentation, fraud, violation of Pennsylvania Fair Trade Practices or violations of consumer protections laws have been perpetrated on the Petitioners by the Respondent.

Conclusions

Petitioners find it hard to believe that in this day and age of consumer protection and required disclosures that the federal court system finds that **a reasonable jury could not find in favor of the Petitioners** following undisputed testimony that the Respondent sold a product under the guise of "Planned Annual Premiums" of $1,320 and $540 respectively, knowing full well, prior to the sale of the product, that the premiums will increase to $30,575 and $28,597 respectively. The Petitioners recognize the burden of the Supreme Court deciding important constitutional matters and apologize in advance for any imposition on the Supreme Court but respectfully plead with the honorable Supreme Court to review this matter so a jury can decide if such behavior on the part of the respondent is

appropriate under the current laws of the United States of America. Based on the above information, we respectfully plead that Certiorari be granted by the Honorable Supreme Court.

Respectfully Submitted

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Joseph C. Fisher, and
Robin H. Fisher, 3:96-CV-1768
Plaintiffs.
vs.
Aetna Life Insurance & (Judge Caputo)
Annuity Company

MEMORANDUM

Plaintiffs filed the present action asserting claims for misrepresentation, negligence and consumer fraud under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. 201-1 to 201-9.2. Defendant filed a motion for summary judgment which is fully briefed and ripe for disposition. For the reasons discussed below, defendant's motion shall be granted.

BACKGROUND

Sometime about 1989, plaintiffs decided to purchase life insurance policies. (Pl.'s Br.in Opp'n, Doc. No. 23 at 5.) Never having purchased life insurance before, plaintiffs went to a long-standing friend and insurance agent, Wally Butz of the Dreher Agency. Id. Wally Butz was the senior member of the agency and in the process of transferring his business to his son, Ted Butz. Id. In 1989, the Dreher Agency was an independent

agency and the Butzs sold life insurance for about five companies, including defendant. (Pls.' Counterstatement of Material Facts 15.) From a number of policies and companies available, Ted and Wally Butz showed plaintiffs illustrations of defendant's universal life policy. Id. 22. On or about May 15, 1989, plaintiffs purchased the life insurance policies at issue from defendant. Id. 1,5. Theodore Butz, of the Dreher Agency was the agent of record for the sale. (See Exhibits to Def.'s Statement of Material Facts, Ex.F)

Plaintiffs' complaint turns on the distinction between tow different types of life insurance. "Whole life" insurance entails paying a fixed premium, for permanent insurance for your whole life, with an investment feature. In contrast, "universal life" does not have a fixed premium, but premiums may be changed by the insurer to adjust to market conditions, such as fluctuations in interest rates and the cost of insurance. Thus, universal life is risky because the performance of the policy depends on the interest rates and costs of insurance that are credited and charged over the life of the policy. When the payment of the planned premium and the cash value is less than the cost of insurance, the policy will lapse unless the insured pays sufficient premiums to maintain it in force.

The policies plaintiffs purchased through the Butzs are universal life insurance policies with $100,000 death benefits. Plaintiffs, however, believed they were purchasing policies with

a fixed $100,000 death benefit and a fixed premium until the policies matured at age 95. (Pls.' Br. In Opp'n at 2.) After plaintiffs learned that their policies could lapse prior to maturity, they filed the present action alleging claims of misrepresentation, negligence and consumer fraud.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 ©) provides that the moving party is entitled to summary judgement if "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law." Fed. R. Civ. P. 56. A fact is "material" if proof of its existence or non-existence might affect the outcome of the suit under the applicable law. Anderson v. Liberty Lobby,Inc. 477 U.S. 242, 248 (1986). "Facts that could alter the outcome are material facts." Charlton v. Paramus Bd. Of Educ., 25 F.3d 194,197 (3rd Cir.), cert.denied. 115 S. Ct. 590 (1994). "Summary judgement will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson. 477 U.S. at 248.

Initially, the moving party must show the absence of a genuine issue concerning any material fact. Celotex Corp. V. Catrett. 477 U.S. 317, 329 (1986). All doubts as to the existence

of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. White v. Westinghouse Elec. Co., 862 F, 2d 56, 59 (3d Cir. 1988); Continental Ins. Co. V. Bodie, 682 F, 2d 436 (3d Cir. 1982). Once the moving party has satisfied its burden, the nonmoving party "must present affirmative evidence to defeat a properly supported motion for summary judgment." Anderson, 477 U. S. At 256-57. Mere conclusory allegations or denials taken from the pleadings are insufficient to withstand a motion for summary judgment once the moving party has presented evidentiary materials. Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990). Rule 56 requires the entry of summary judgment, after adequate time for discovery, where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden no proof/: Id, at 323.

DISCUSSION

Plaintiffs assert claims for misrepresentation, negligence and consumer fraud.[1] Specifically, plaintiffs claim that defendant "misrepresented its universal life policies by providing misleading information to its agents, failing to make material disclosures in illustrations and sales materials and failing to advise the insured of the basic risks, features and operations of its policies." (Pls. Br. In Opp'n at 11.) Plaintiffs argue that defendant embarked upon a deliberate and intentional effort to deceive its own agents and customers that the product being sold was whole life instead of universal life. Id, at 6-7.

Plaintiffs' misrepresentation claim can be separated into two parts: a) that the *policies* were inadequate because they failed to disclose the material risks; and b) that the *sales presentations* were inadequate because they failed to advise the insured of the basic risks. Id, at 11. The court will address each of these allegations separately.

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1. Under Pennsylvania law, an insurer can be held liable under the Unfair Trade Practices and consumer Protection Law ("CPL"), 73 P.S. 201-1 to 201-9.2, only if there are fraudulent misrepresentations in order to sell a policy. Aetna Cas. & Surety Co. v. Ericksen, 903 F. Supp. 836, 841 (M.D. Pa. 1995) (citing Pekular v. Eich, 355 Pa. Super. 276, 513 A. 2d 427 (1986). Thus, in order for plaintiffs to maintain their claim for consumer fraud under the CPL, they must also prove the five elements of a misrepresentation claim.

Similarly, plaintiffs' negligence claim is contingent upon their claim for misrepresentation. If plaintiffs cannot show that any actionable misrepresentations or omissions occurred, then any negligence by defendant in training or supervising its agents is irrelevant. The Court will therefore first address plaintiffs' claims for misrepresentation.

Under Pennsylvania law, to establish a claim of fraudulent misrepresentation plaintiffs must prove by clear and convincing evidence:

> (1) a false representation of an existing fact or a non-privileged failure to disclose; (2) materiality, unless the misrepresentation is intentional or involves a non-privileged failure to disclose; (3) scienter, which may be either actual knowledge or reckless indifference to the truth; (4) justifiable reliance on the misrepresentation, so that the exercise of common prudence or diligence could not have ascertained the truth; and (5) damage as a proximate result.

Wittekamp v. Gulf & Western, Inc, 991 F.2d 1137, 1142 (3d Cir. 1993).

Pennsylvania law requires "the trial judge {to} decide as a matter of law before he submits a case to the jury whether plaintiffs' evidence attempting to prove fraud is sufficiently clear, precise and convincing to make out a prima facie case". Mellon Bank, 951 F.2d at 1409 (citing Beardshall v. Minuteman Press Int'l, Inc., 664 Fl23, 26 (ed Cir. 1981). Thus, in order to defeat a defendant's motion for summary judgement, a plaintiff must meet his or her burden of coming forward with evidence which could lead a jury to find clear and convincing proof of fraud.

Moffatt Enterprises, Inc. V. Borden Inc., 807 F.2d 1169, 1174-75 (ed Cir. 1986). We find that plaintiffs in the present case have failed to provide clear and convincing evidence to support their claims of misrepresentation.

A. The Policies

The first element of a claim for misrepresentation is a false representation. Wittekamp, 992 F.2d at 1142. Plaintiffs claim that the policies themselves are false representations because they are "confusing, unreadable and misleading in that they fail to disclose the basic nature and fundamental features of the product sold." (Pls.' Br. In Opp'n at 16.) Specifically, plaintiffs argue that the policies do not adequately disclose the inherent risks of the policy--its interest rate sensitivity and the fact that the policy may lapse prior to maturity.[2]

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2. Plaintiffs also argue that the policies are misleading because the words "universal life" do not appear anywhere in the policy. (Pls.' Br. In Opp'n at 16.) The policy is entitled "flexible premium adjustable life insurance adjustable death proceeds payable upon death prior to maturity date flexible premiums payable until maturity date or prior death net cash value proceeds payable if insured is living on maturity date non-participating."31 PA. Code 89.11 (d). Although this description my not exactly be "brief", the Court agrees with defendant that such language complies with the insurance regulations.

Further, the Court does not believe that the policy is misleading simply because it does not contain the words "universal life". For instance, plaintiff, Mr. Fisher, testified that he knew he was buying a "universal life" policy as opposed to a "whole life" policy. (Exhibits to Reply Memorandum, Doc. No. 27, Ex. M at 30.) Thus, to the average lay person, the words "universal life"' alone, would no disclose the risks inherent in the policy.

IMPORTANT NOTICE: THE PROJECTED RESULTS OF YOUR INSURANCE PROGRAM MAY CHANGE WITH VARIATIONS IN THE INTEREST RATES CREDITED BY AETNA, THE COST OF INSURANCE RATES, EXPENSE FACTORS, AND THE FREQUENCY, TIMING AND AMOUNT OF YOUR PREMIUM PAYMENTS AND WITHDRAWALS.

(Comp. Ex. A at 3.)

Immediately below this warning are two side-by-side illustrations or the projected performance of the policies based on current and guaranteed rate assumptions. The first illustration is entitled CURRENT BENEFITS, which is followed by three asterisks and defined on the next page:

CURRENT BENEFITS ARE BASED ON CURRENT RATES AND ARE NOT GUARANTEED. THE CURRENTLY PAID ANNUAL INTEREST RATE IS 8.59%. IF THE CURRENT COST OF INSURANCE AND CURRENT INTEREST RATE ARE CHANGED, BENEFITS MAY BE MORE OR LESS THAN THE AMOUNTS SHOWN BUT NOT LESS THAN THE GUARANTEED BENEFITS.

(Compl. Ex. A at 4.)

The second illustration is entitled Guaranteed Benefits, which is followed by four asterisks and defined on the next page:

> GUARANTEED BENEFITS ARE BASED ON THE MAXIMUM GUARANTEED COST OF INSURANCE AND AN ANNUAL INTEREST RATE OF 4.50%.

Compl. Ex. A at 4.) This illustration shows that if interest is credited at the guaranteed minimum and costs assessed at the maximum, the death benefit, cash value and surrender value of the policy will be zero (0) at age sixty-five (65).

On page two of the Statement of Policy Costs and Benefit Information appears the language:

> IF PLANNED PREMIUMS ARE PAID THE POLICY WILL TERMINATE FOR INSUFFICIENT VALUE ON APRIL 1, 2010 ASSUMING THE INTEREST AND DEDUCTIONS AT THE GUARANTEED RATES.

(Compl. Ex. A at 7.)

Thus, after review of the policies, the Court finds that the policies are not misleading or deceptive. The policies accurately inform the policy holder that they are interest rate sensitive and could lapse, depending on various circumstances, prior to maturity. Accordingly, the policies themselves cannot support a finding of misrepresentation.

B The Sales Presentations

Plaintiffs also claim that defendant engaged in a deceptive marketing practice to sell universal life. (Pls.' Br. In Opp'n at 4.) Plaintiffs argue that the misrepresentations made during the sales presentations were a result of defendant's negligence in training its agents. The argument is that defendant misrepresented its

universal life policies by providing misleading information to its agents and failing to train its agents to disclose the basic risks and features of the policies.

In order for defendant to be liable for misrepresentations made during the sales presentations, the misrepresentations made by the Butzs, as a matter of law, must be imputed to the defendant. The law in Pennsylvania on determining the agency status of an insurance broker is based on the case of Taylor v. Crowe. 444 Pa. 471, 282 A.2d 682 (1971). In that case, plaintiffs argued that the insurance companies were liable for misrepresentations made by the broker because he was an agent of the insurance companies. Id. At 474, 282 A.2d at 683. The trial court directed a verdict in favor of the insurance companies because there was no evidence that the broker was an agent of the insurance companies. On appeal, the Pennsylvania supreme Court cited testimony to the effect that: the broker had complete charge of plaintiffs' insurance needs for several businesses, plaintiffs trusted the broker to go out and buy the best insurance he could get, and plaintiffs were not concerned with where the broker purchased the insurance. On the basis of this testimony, the Court found the precedent of Taylor & L&G Ins. Co. To be controlling:

> [where a person desiring to have his property insured applies not to any particular company or its known agent, but to an insurance broker, permitting him to choose which company shall become the insurer, a long line of

> decisions has declared the broker to be the agent of the insured; not of the insurer.

Id. At 475, 282 A.2d at 683(citing Liverpool, 68 Pa. Super. 302, 304 (1917). The Pennsylvania Supreme Court therefore affirmed the trial court's decision stating "[t]here was absolutely no evidence that [the broker] was the agent of the insurance companies so as to make them liable for his representations." Id. At 476, 282 A.2d at 684.

In the present case, there is similar evidence indicating that the Butzs were the agents of the plaintiffs and not defendant. Wally and Ted Butz were not career agents of the defendant. Id. Ex. B. Plaintiffs have admitted that the Dreher Agency was an independent agency in 1989 and that the Butzs sold life insurance policies for at least five different companies. (Pl's Counterstatement of Material Facts 15.) Moreover, there is no evidence which suggests that the plaintiffs thought the Butzs were agents for the defendant. See Rich Maid Kitchens, Inc. V Pennsylvania Lumberman's Mut. Ins. Co., 641 F.Supp. 297, 303 (E.D. Pa 1986).

Plaintiff, Mr. Fisher, testified that "it was old friends. Wally was always my insurance advisor and I needed advice, so it was the same old scenario." (Exhibits to Defi' M. For summ. J. Ex. A at 34.) Here further testified "[i]t wasn't a matter of Wally coming to try to sell me a policy. It was a matter of Joe is going to buy a policy today, whatever it was it was, based on his

best advice, and that's what we did." Id. At 36-37. In fact, Wally Butz was plaintiff's ex wife's uncle. Id. At 24. Plaintiff purchased his first insurance policy from Wally Butz about thirty years ago and has purchased several different types of insurance through him.

Id. At 26-27. See also Rich Maid 641 F. Supp. At 304.

The nature of the relationship between the broker and the insured is a critical factor in determining the agency status of a broker. In this case, the evidence shows that plaintiffs did not seek out an agent of the defendant to purchase insurance specifically from defendant. Rather, plaintiffs wert to Wally Butz, as a long time insurance advisor to purchase whatever insurance company and policy Mr. Butz recommended. In this situation, courts have held that the broker is acting as the agent of the insured and not the insurer. See e.g., Crowe, 444 Pa. At 471, 282 A.sd at 682: Kairys v. Aetna Cas. Sur. Co., 314 Pa. Super. 502, 461 A.2d 269 (1983); Rich Maid, 641 F. Supp. At 303.

The court in Rich Maid summarized the agency status as follows:

> Generally, an insurance agent is employed by an insurance company and represents the insurer's interests. An insurance broker is not employed by any specific insurance company and acts as a middle man between the insured and the insurance company. The broker solicits the public and then places the requested insurance with a company.

Rich Maid, 641 F. Supp. At 303 (citing 3 Couch on Insurance 2d 25:93-94 (1984).

While an insurance broker is usually an agent for the insured; in some situations, a broker can be an agent for the insured in some respects and an agent for the insurer in other respects. Rich Maid, 641 F. Supp at 303. However, in order to find that a broker is an agent of the insurer, there must be some evidence which could be inferred as authorization by the company to the broker. Id. Thus, the agency status of a broker depends on the relationship between the broker and the insured as well as the broker and the insurer. Evidence that a broker has authority to bind the insurer. Id. At 304.

In the present case, plaintiffs have submitted no such evidence. To defeat defendant's motion for summary judgement, plaintiffs must provide clear and convincing evidence of each element of misrepresentation. Moffatt Enterprises, Inc. V. Borden Inc., 807 F.2d 169, 1174-75 (3d Cir. 1986). Plaintiffs therefore have the burden to prove that the Butzs were agents of the defendant in order to impute any actionable misrepresentations or omissions to the defendant. Plaintiffs have failed to submit any such evidence.[3] As discussed above, the evidence indicates that the Butzs in this case were acting as the

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3. Plaintiffs, in their briefs and document submitted, have not addressed the issue of the agency status of the Butzs.

agents of the plaintiffs and not the defendant. In the absence of any evidence of authorization, no agency relationship can be established between the Butzs and the defendant. See Taylor, 444 Pa. At 475, 282 A.2d at 683-84. Therefore, plaintiffs have failed to provide clear and convincing evidence that defendant is liable for any actionable misrepresentations or missions made by the Butzs during the sales presentations.

Furthermore, even if any misrepresentations made by the Butzs could be imputed to defendant, plaintiffs cannot prove that they justifiably relied on the misrepresentations. Plaintiffs have the burden to provide clear and convincing evidence that they justifiably relied on actionable misrepresentations or omissions. Moffatt Enterprises, 807 F.2d at 1174-75.

If plaintiffs were not satisfied with the policies, the first page of both policies provided plaintiffs with a "Right of Policy Examination." (Compl. Ex. A at 1.) Plaintiffs could have canceled the policies up to ten (10) days after they were delivered and received a full refund of their premiums. In fact, plaintiff, Mr. Fisher testified:

> "A: When the policy came in I sat down t read it and I had several questions and I called Wally, and he answered my questions.
>
> Q: Can you tell me what questions you had?

> A: Yes. One page of the Policy [] had two charts and one showed one set of performace and the other showed another performace and I didn't understand the difference. And I called Wally to ask him about that. Ane at one spot in the policy it said something about the policy could lapse at a certain time. And he told me that yes, it could, you know, if the interest rates got below 3% and the world would be bankrupt and it wouldn't make any difference anyway. And whatever questions I had he just assured me the policy was okay and not to worry about it."

(Exhibits to Defs.' M. For summ. J., Ex. A at 37-38.)

The policy was therefore clear enough to provide some notice to plaintiff that the policies did not perform as plaintiff originally believed. Whether reliance on a misrepresentation is justified, is dependent in part on subjective factors such as the respective intelligence and experience of the parties. See Wittekamp v. Gulf & Western, Inc. 991 F.2d 1137, 1144 (3d

Cir. 1993). Mr. Fisher apprises real estate of a living and has a Master's degree, a real estate brokers license and a real estate appraiser's certification. Given his background and education, the express language in the policy, and Wally Butz's statement that the policy would not lapse unless the interest rate dropped below 3% and the whole world would be bankrupt; it is difficult to believe that plaintiff justifiably relied on misrepresentations that the policy was not interest rate sensitive and could not lapse prior to maturity.

Moreover, plaintiffs' policies contained a provision to the effect that an agent has no authority to bind defendant beyond the language of the written policy. The provision provides:

> "this policy and the application are the whole contract... Only an officer of [defendant] may agree to change in the policy, and then only in writing. All statements made by or for the Insured are representations and not warranties. No statement will be used to void the policy or defend against a claim unless it is contained in an application."

(Compl. Ex. A at 22.)

Thus, even if Wally Butz did provide false assurances, plaintiffs have not provided clear and convincing evidence that they justifiably relied on oral misrepresentations which directly contradicted the language of the policy. See Good v. Metropolitan Life Ins. Co., 166 Pa. Super. 334, 342, 71 A.2d 805, 809 (1950); In re Prudential Ins. Co. Of America, 975 F.Supp. 584, 600 (D. NJ. 1997). Accordingly, any misrepresentations made by the Butzs, during a sales presentation or afterward, cannot be the basis for plaintiffs' claims of misrepresentation.

Plaintiffs argue that the fact that Wally and Ted Butz were also confused about the nature of the policies and universal life shows that defendant trained them in a manner that ignored the fundamental risks of universal life. (Pls.' Br. In Opp'n at 10. Plaintiffs claim that after attending the seminars, reading the materials and reading sample policies, Wally Butz believed that universal life was whole life insurance. At 9. They also contend that Ted Butz believed that universal life provided for a level premium over the term of the policy and that so long as the annual premiums were paid, the policy would not lapse. Id. At 10.

Plaintiffs, however, have presented no evidence that demonstrates that Wally and Ted Butz did not understand the basic features of universal life. To the contrary, the evidence submitted shows that the Butzs received adequate sales training

and materials from defendant. Wally Butz testified that he attended special training sessions for universal life and that when defendant came out with a new product, it mad sure that their people understood it before it would license them to sell it. (Exhibits to Br. In Opp'n, Ex. J at 27-28.) He also testified that after the training he understood the basic differences between term life, universal life and whole live insurance. Id. At 28. He testified further that he know that universal life was sensitive to fluctuations in interest rates, however, he admitted that his practice was to represent to the insured that the current rates shown on the projection was what would most likely occur over the lifetime of the insured. Id. At 32-37.

Ted Butz testified that he also went to training seminars by defendant and received training materials and brochures. (Exhibits to Reply Memorandum, Ex. L at 14-16. He testified that he and his father selected the policy at issue because it was the "most competitive and best policy" that they had for universal life. (Exhibits to Br. In Support of M. For Summ J., Ex. D at 173.) He further testified that he brought a proposal to the sales presentation with the plaintiffs that explained how the policy would perform under the guaranteed interest rate, under the current interest rate and an assumed rate. Id. At 181. Moreover, he stated that it was his practice to explain this information to the insured. (Exhibits to Br. In Opp'n, Ex. O at 66.)

Plaintiffs have failed to present any evidence that shows that the Butzs were confused about universal life due to the deceptive and misleading training practice of the defendant. Indeed, the testimony of the Butzs is to the contrary.

We find that plaintiffs have failed to provide clear and convincing evidence to Warrant submitting their claims of misrepresentation to a jury.[4] See Mellon Bank, 951 F2d at 1409 (citing Beardshall v. Minutemann Press Int'l Inc, 644 F.2d 23, 26 (3d Cir. 1981.) Defendant's motion for summary judgement will therefore be granted.

An appropriate order will follow.

May 11, 1998
Date

A. Richard Caputo
United States District Judge

4. Because plaintiffs' claims of consumer fraud and negligence are contingent upon their misrepresentation claim (see supra note 1) these claims must also be dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOSEPH C. FISHER and ROBIN H. FISHER

Plaintiffs,

vs. 3:96-CV-1768

AETNA LIFE INSURANCE & ANNUITY COMPANY, (JUDGE CAPUTO)

Defendant.

ORDER

NOW, this 11th day of may, 1998, in accordance with the attached Memorandum, it is hereby ORDERED that defendant's Motion of Summary Judgement (Doc. No. 16) is GRANTED. The Clerk of the court is directed to close this case.

A. Richard Caputo
United States District Judge

APPENDIX B

UNREPORTED-NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7356

JOSEPH C. FISHER;
ROBIN H. FISHER
Appellants

V.

AETNA LIFE INSURANCE & ANNUITY COMPANY

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D. C. Civil No. 96-cv-01768
District Judge: Honorable A. Richard Caputo

Submitted Under Third Circuit LAR 34.1(a)
January 25, 1999
Before: SLOVITER, McKEE, and RENDELL, Circuit Judges
(Filed: January 28, 1999)

MEMORANDUM OPINION

Joseph C. Fisher and Robin H. Fisher appeal from the district court's grant of summary judgment for Aetna Life Insurance & Annuity Company ("Aetna") on the Fishers' claims of misrepresentation, negligence and consumer fraud under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. 201-1 to 201-9.2. For the reasons that follow, we will affirm.

I.

This dispute arose from the Fishers' purchase of life insurance policies from Aetna in 1989 through their friend and insurance agent, Wally Butz, and his son, Ted Butz, of the Dreher Agency. The Fishers thought they were purchasing policies that provided a fixed $100,000 death benefit at a fixed premium until the policies matured. After receiving and reading his policy, Joseph Fisher ("Mr. Fisher") had questions about information in the policy indication that the policy could lapse before maturity. The policy contained several statements indicating that the premiums and benefits could change as interest and insurance rates vary with time[1]. Mr. Fisher asserts that after

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1 The policies include the following statements under the Statement of Policy Costs and Benefit Information:

> IMPORTANT NOTICE: THE PROJECTED RESULTS OF YOUR INSURANCE PROGRAM MAY CHANGE WITH VARIATIONS IN THE INTEREST RATES CREDITED BY AETNA, THE COST OF INSURANCE RATES, EXPENSE FACTORS, AND THE FREQUENCY, TIMING AND AMOUNT OF YOUR PREMIUM PAYMENTS AND WITHDRAWALS.

contacting Wally Butz, he did not think the policy could lapse unless the interest rates dropped to three percent. In 1995, the Fishers learned that their policies would lapse before maturity

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> IF PLANNED PREMIUMS ARE PAID THE POLICY WILL TERMINATE FOR INSUFFICIENT VALUE ON APRIL 1, 2010 ASSUMING THE INTEREST AND DEDUCTIONS AT THE GUARANTEED RATES.
>
> CURRENT BENEFITS ARE BASED ON CURRENT RATES AND ARE NOT GUARANTEED. THE CURRENTLY PAID ANNUAL INTEREST RATE IS 8.50%. IF THE CURRENT COST OF INSURANCE AND CURRENT INTEREST RATE ARE CHANGED, BENEFITS MAY BE MORE OR LESS THAN THE AMOUNTS SHOWN BUT NOT LESS THAN THE GUARANTEED BENEFITS.
>
> GUARANTEED BENEFITS ARE BASED ON THE MAXIMUM GUARANTEED COST OF INSURANCE AND AN ANNUAL INTEREST RATE OF 4.50%

The following statement is included in the Policy Specifications portions of the policies:

> THIS POLICY MAY TERMINATE PRIOR TO THE MATURITY DATE IF PREMIUMS PAID AND INTEREST CREDITED ARE INSUFFICIENT TO CONTINUE COVERAGE TO THAT DATE[.] EVEN IF IT CONTINUES TO THE MATURITY DATE, THERE MAY BE LITTLE OR NO CASH VALUE TO BE PAID ON THAT DATE. COVERAGE MAY ALSO BE AFFECTED BY CHANGES IN CURRENT VALUES.

unless they paid increased premiums.

II.

The Fishers first claim is misrepresentation. To establish a claim of fraudulent misrepresentation under Pennsylvania law a plaintiff must prove the following elements by clear and convincing evidence:

> (1) a false representation of an existing fact or a nonprivileged failure to disclose; (2) materiality, unless the misrepresentation is intentional or involves a nonprivileged failure to disclose; (3) scienter, which may be either actual knowledge or reckless indifference to the truth; (4) justifiable reliance on the misrepresentation, so that the exercise of common prudence or diligence could not have ascertained the truth, and (5) damage to him as a proximate result.

Wittekamp v. Gulf & Western, Inc., 991 F.2d 1137, 1142 (3d Cir. 1993). Pennsylvania also recognized the common law tort of negligent misrepresentation. Gibbs v. Ernst, 538 Pa. 193, 212, 647 A.2d 882, 891 (1994). The elements which must be proven for negligent misrepresentation are:

> (1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth of falsity or must make the representation under circumstances in which he ought to have known of

> its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.

Id. 538 Pa. At 210, A.2d at 890. Upon review of the evidence, the district court concluded that the Fishers failed to provide clear and convincing evidence to support their claim of misrepresentation. The Fishers contend that the district court erred in applying the clear and convincing proof standard associated with fraudulent misrepresentation. By asserting that the clear and convincing standard is not necessary, the Fishers appear to indicate that their misrepresentation claim also encompasses negligent misrepresentation, although the record is vague on this point.

Our review of the district court's grant of summary judgment is plenary. Sameric Corp. Of Delaware, Inc. V. City of Philadelphia, 142 F.3d 582, 590 (3d Cir. 1998). The district court was correct in requiring the Fishers to provide clear and convincing evidence to support their fraudulent misrepresentation claim. Based on our review of the policy language and the alleged statements made by the sales representatives, we do not find clear and convincing evidence upon which a reasonable jury could return a verdict that Aetna falsely misrepresented material facts in selling life insurance to the Fishers.

Assuming that the Fishers have also raised a negligent misrepresentation claim, the Fishers still must show that Aetna misrepresented a material fact in selling the life insurance policies to them. The Fishers assert that the policies misrepresent the actual cost associated with the policies and the likelihood that the policies will lapse. The policies include statements, however, that inform the Fishers that the cost of the policies is dependant upon interest rates, that premiums can vary, and that the policies have the potential to lapse. The fact that the Fishers may not have understood the significance of these statements is not a sufficient basis for submitting a claim of negligent misrepresentation to the jury. We, therefore, affirm the district court's grant of summary judgment to Aetna on the Fishers' misrepresentation claim.

III.

The Fishers' second claim is consumer fraud under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. 201-1 to 201-9.2. Specifically, the Fishers assert that Aetna engaged in the following unfair or deceptive acts under the statute:

> Representing that goods or services have sponsorship, approval, characteristics, ingredients, used, benefits or quantities that they do not have . . . , 73 P.S. 201-2(4)(v); and

> Representing that goods or services are of a particular standard, quality or grade . . . if they are of another, 73 P.S. 201-2(4)(vii).

The district court concluded that in order for the Fishers to maintain their claim for consumer fraud under the statute, they had to prove the five elements of a misrepresentation claim. The court ruled that since the Fishers failed in their fraudulent misrepresentation claim, they would likewise fail on their consumer fraud claim. The Fishers contend that the district court erred by imposing the fraudulent misrepresentation standards on their consumer fraud claim.

In DiLucido v. Terminix Int'l, Inc., 450 Pa. Super. 393, 401, 676 A.2d 1237, 1241 (1996), the court held that plaintiffs are not required to prove the elements of a common law fraud to establish every unfair or deceptive act defined under the statute. The court ruled that for the act defined in 73 P.S. 2-201(4)(v), which is a basis for the Fishers' claim, "a plaintiff must establish that a defendant's advertisement is false, that is actually deceives or has a tendency to deceive a substantial segment of its audience, and that the false advertising is likely to make a difference in the purchasing decision." Although the court did not specifically address 2-201(4)(vii), the language of that section suggests a similar standard. We, therefore, agree with the Fishers' that they are not required to prove fraud in order to prevail under the consumer fraud statute. However, the Fishers

must still establish that a misrepresentation occurred. Since we concluded no misrepresentation occurred, the Fishers cannot prevail on their consumer fraud claim. We, therefore, affirm the district court's grant of summary judgment for Aetna on the Fishers' consumer fraud claim.

IV.

The Fishers' third claim is negligence by Aetna in training or supervising its sales representatives. The district court concluded that the Fisher's negligence claim was contingent upon their claim for misrepresentation and that the Fishers' must first show that a misrepresentation has occurred before they can establish that Aetna was negligent in training or supervising its sales representatives. The Fishers contend that because the district court erred in applying a clear and convincing evidence standard to their misrepresentation claim, the district court's analysis of their negligence claim is also in error. We agree with the district court's finding that the Fishers must first show that a misrepresentation has occurred before they can assert that Aetna was negligent in training or supervising its sales representatives. Since we have concluded that the Fishers cannot prevail on their misrepresentation claim, we affirm the district court's grant of summary judgment to Aetna on the Fisher's negligence claim as well.

V.

Accordingly, we will affirm the district court's grant of summary judgment to Aetna substantially for reasons set forth by the district court.

TO THE CLERK OF THE COURT:

Please file the foregoing Opinion

Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 98-7356

JOSEPH C. FISHER;

ROBIN H. FISHER

Appellants

V.

AETNA LIFE INSURANCE & ANNUITY COMPANY

ON APPEAL FROM

THE UNITED STATES DISTRICT COURT

FRO THE MIDDLE DISTRICT OF PENNSYLVANIA

(D. C. Civil No. 96-cv-01768)

District Judge: Honorable A. Richard Caputo

Submitted Under Third Circuit LAR 34.1(a)

January 25, 1999

Before: SLOVITER, McKEE, and RENDELL, Circuit Judges

(Filed: , 1999)

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a). On consideration whereof, it is now ORDERED AND ADJUDGED by this court that the order of the district court dated May 11, 1998, is hereby affirmed.

Costs taxed against appellant.

ATTEST:

Clerk